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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-_____

JOHN IKE GRIFFITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLES, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction in the United States District Court for the Northern District of Alabama.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit in United States of America vs. John Ike Griffith, Case No. 71-1911 (..... F. 2d ....., entered January 20, 1972) (Appendix A).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction was entered on January 20, 1972 (..... F. 2d .....) (Appendix A).

On February 15, 1972, the time for filing this petition was extended to and including March 20, 1972.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Circumstances of the Case

Petitioner was tried and convicted in the United States District Court for the Northern District of Alabama on an indictment charging him with conspiracy to use the United States mails to defraud, in violation of Title 18, United States Code, Section 371, and five counts based on specific acts of mail fraud, in violation of Title 18, United States Code, Section 1341. (R. 1-14).

The defendant's motion to dismiss the indictment (R. 16) was denied by the trial court (R. 17).

The defendant's pre-trial motion for the suppression of evidence and return of seized property (R. 27) was denied (R. 28).

On April 5, 1971, issue was joined between the Government and the defendant before the Honorable Clarence W. Allgood. The selection of a jury to try the cause consumed one and one-half trial days. The questions presented for determination by this petition concern errors occurring during defendant's trial.

On April 16, 1971 the jury returned a verdict of guilty on all counts. On that date the Court entered a judgment of conviction and sentenced the defendant as follows:

COUNT ONE—Five years in prison and a $10,000.00 fine

COUNT TWO—Five years in prison (concurrently with the sentence in Count One)

COUNT THREE—Five years in prison (concurrently with Counts One and Two)

COUNT FOUR—Three years probation (to begin upon release of custody)

COUNT FIVE—Three years probation (concurrently with Count Four)

COUNT SIX—Three years probation (concurrently with Counts Four and Five) with a special condition of probation that defendant pay fine and costs.

The defendant's timely motion for a new trial (R. 54) was denied by the trial court (R. 57).

Thereafter petitioner appealed his conviction for the United States Court of Appeals for the Fifth Circuit, which affirmed petitioner's conviction in a judgment and opinion entered on January 20, 1972 (Appendix A).

The Questions

I

1. Is the admission of testimony of forged signatures on documents previously admitted into evidence during petitioner's trial on charges of mail fraud and mail fraud conspiracy arising out of petitioner's activities in obtaining so called "Quickie" divorces, prejudicial error and beyond an appellate court's power of rescue under the harmless error rule?

II

2. May a Jencks Act violation be considered harmless error on the grounds that the testimony of the witness whose statement was erroneously withheld was cumulative? (Are the decisions of this Court in *Rosenberg* v. *United States*, 360 U. S. 367; 76 S. Ct. 1231, 3 L. Ed. 2d 1304; *Clancy* v. *United States*, 365 U. S. 312, 81 S. Ct. 645, 5 L. Ed. 2d 574; and *Killian* v. *United States*, 368 U. S. 231, 82 S. Ct. 302, 7 L. Ed. 2d 256; to be given a liberal construction or a strict construction confined to the facts as therein presented?)

3. Is an appellate court the proper forum to determine, in the first instance, whether or not a violation of the Jencks Act constitutes harmless error?

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, 18 United States Code

Rule 52 (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

18 U. S. C. 3500. Demands for production of statements and reports of witnesses

* * *

(b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Court shall

order it to be delivered directly to the defendant for his examination and use.

* * *

(e) The term "statement" as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

* * *

As amended Pub. L. 91-452, Title I, Section 102, October 15, 1970, 84 Stat. 926.

STATEMENT OF THE CASE

Count One of the indictment (R. 1-14) charged the defendant and others, with conspiring to violate 18 USC 1341 (Mail Fraud) in connection with their activities in obtaining Alabama divorces for alleged non-resident citizens of the State of Alabama. Specifically, it appears from Count One that the representations regarding the validity of such divorces were made by the defendants to the alleged non-resident citizens knowing at the time that the representations were made that they were false. It is further charged that each of such non-resident citizens received a document purporting to be a decree of divorce which was invalid.

Counts Two through Six of the indictment charge specific mailings in furtherance of the scheme to defraud which is alleged in paragraph 3 of Count One of the indictment as substantive offenses under 18 USC 1341.

Prior to the return of this indictment by the Grand Jury on August 20, 1970, United States Postal Inspectors searched the offices of the defendant pursuant to a search warrant issued by the United States Commissioner upon the Affidavits of Frank M. Bainbridge, a practicing attor-

ney, Charles E. Davis, a United States Postal Inspector, and William H. Morrow, Jr., General Counsel of the Alabama State Bar. Defendant raised the issue of the sufficiency of the Affidavits to support a finding of probable cause such as to justify the issuance of this search warrant by filing a motion for the return of seized property and the suppression of evidence (R. 27-28). This motion was denied by the court (R. 28). This motion also sought to suppress as evidence certain material which was seized during the search but which was not described at all in the warrant.

Defendant's trial commenced on April 5, 1971. The voir dire examination of the jury was rather lengthy as each juror was examined by the Court individually and out of the presence of the other jurors due to extensive pre-trial publicity with respect to this and another related case (R. 1-350).

At the commencement of the trial, the Judge, in anticipation of a lengthy trial, gave a short preliminary instruction to the jury pursuant to the pre-trial order (R. 351-367).

The first witness for the Government was Miss Arlene Gellman. This witness testified that she contacted the defendant's office by phone shortly before she made a trip to Birmingham in October of 1969. The witness testified that after she returned to New Jersey she received a divorce decree through the United States mails. While in Birmingham the witness stated that her mother paid the defendant $465.00 (R. 368-405).

The Government's next witness was L. P. Waid, a Circuit Judge of the Thirteenth Judicial Circuit of Alabama. Judge Waid testified that he took the office previously held by French O. Whitten, Jr., one of the defendants named in the indictment in this case, on January 19, 1971. Judge Waid testified that he found a large quantity of

files in a small room off of the chambers previously occupied by Judge Whitten (R. 418-430).

On cross-examination defendant's counsel attempted to elicit from the witness testimony regarding Alabama Law with respect to divorce. The Court sustained the Government's objection to this line of questioning, and limited cross-examination to matters gone into on direct examination (R. 436).

Henry Clemons Rowe, the Sheriff of St. Clair County, testified that he was present on February 5, 1971, when Judge Waid discovered the files in the room off of his chambers.

The next witness, Charles E. Davis, a United States Postal Inspector, testified that there were 2,295 files in that closet (R. 463). Mr. Davis testified that none of the files were indexed in that Court House.

The next witness to testify for the Government was Mr. J. W. Holland, Jr., a United States Postal Inspector, who testified that he participated in a search of the defendant's office at Room 411 of the Central Bank Building in Birmingham, Alabama, on August 14, 1970 (R. 473). The witness testified that the warrant was served upon the defendant, whereupon he and Mr. Charles E. Davis conducted a search of the office. He testified that during this search certain items were seized from the defendant's office, at which point the defendant objected to the admission into evidence of such items (R. 477-486). The defendant objected to the admissibility of all of the items seized in the search on substantially the same grounds as those contained in his motion to suppress which had previously been denied by the Court, that is the insufficiency of the affidavits upon which the warrant was issued. More particularly the defendant objected to certain items seized during the search on the grounds that those items had not

been specifically designated in the warrant pursuant to which the search was conducted. Objections on all grounds were overruled by the Court, and the defendant was given a standing objection to any and all testimony concerning each and every item seized in the search of the defendant's office (R. 485-486).

The Government's Exhibits 47 through 109 are those items which were seized during the search of the defendant's office (R. 479).

The witness next identified each of those items whereupon each was offered and received into evidence, defendant's objections thereto having previously been overruled by the Court (R. 487-519).

Marie Brisciotti, the Government's next witness, testified that she came from New Jersey to Birmingham in November, 1969, for the purpose of obtaining a divorce from her husband, Vincent Busardo. She testified that she first contacted the defendant by mail. She then received a response to her correspondence in the mail. The witness testified that she came to Birmingham, Alabama, met with the defendant in his office, discussed the matter of a divorce with him, returned to her home in New Jersey, forwarded by mail a check in the amount of $465.00 to the defendant and later received in the mail two copies of a divorce decree (R. 526-546).

Mr. Jack William Cervetto next testified that he came from New Jersey to Alabama in April, 1969, to obtain a divorce. He stated that he first contacted Mr. Griffith by mail, that he received a response through the mail, that he came to Birmingham, paid Mr. Griffith $465.00 and subsequently received in the United States Mail, a divorce decree (R. 554-576).

The next witness for the Government, Gustav Wedin, testified that he came from New Jersey to Alabama for the purpose of getting a divorce after corresponding with the defendant by mail. He testified that while in Birmingham he gave the defendant $465.00 in money orders and that shortly after his return to New Jersey he received a divorce decree in the mail in an envelope bearing the return address of Mrs. Grace Henderson who was identified by stipulation as the daughter of the defendant (R. 581-594, 42).

The Government then called to the stand as a witness Patricia Berger (R. 599). The defendant requested and received permission to conduct a voir dire examination of this witness, during which examination the witness testified that she had never seen the defendant, that she had no personal knowledge of nor did she participate in the obtaining of a divorce (R. 600). She testified that her husband had shown her a copy of a decree of divorce.

The defendant objected to any further testimony by the witness, which said objection was overruled by the Court (R. 600).

The witness was asked if she had ever seen or signed a document bearing the caption or title of "Acceptance of Service of Process and Answer and Waiver of Respondent" (R. 601). The defendant's objection to this question was overruled by the Court.

Defendant was granted additional voir dire examination during which the witness testified that she did not know what an Answer and Waiver was and that she had never signed any papers in connection with a divorce. At that time a signature purporting to be a signature of the witness was demonstrated to the witness and denied by the witness (R. 602).

At this point the defendant again objected to any further testimony from this witness (R. 603).

Government's Exhibit 123 was identified by the witness as being a copy of the divorce decree which was shown to her by her husband at the time that he told her that they were divorced in October, 1969 (R. 605-606). The defendant's objection (R. 605) was overruled by the Court (R. 606). The witness was again asked by the attorney for the Government whether she had signed any papers for a divorce and the witness again answered that she had not (R. 606).

An additional ground of objection to Government Exhibit 123, that the exhibit was a Xerox or photostatic copy of a divorce decree, was interposed by the defendant (R. 607). The Exhibit was also objected to on the additional grounds that it had not been in any way identified as to source and that there had been no testimony regarding its origin or the means by which it came into the possession of the Attorney for the Government. This objection was likewise overruled by the Court (R. 609).

There was then a discussion between counsel and the Court regarding the purported origin from which the copy identified as Government's Exhibit #123 was made (R. 611). The purported original document was identified as Government's Exhibit 123 (R. 612). A portion of Exhibit 124 was identified as "Agreement and/or Stipulation" (R. 612). With respect thereto, the witness testified that the Complainant's signature was that of her husband but that the signature which purported to be the signature of Patricia Berger was not her signature (R. 613). The witness again testified that the signature "Patricia Berger" on the document captioned "Acceptance of Service of Process and Answer & Waiver of Respondent" was not her signature, that she did not know the persons who had wit-

nessed that signature and that she had not signed a power of attorney which purported to be signed by her (R. 615).

The Government then offered the purported original, Exhibit 124, into evidence (R. 615). The defendant asked to be heard outside the presence of the jury. The Court, however, stated that it was going to admit the Exhibit with certain instructions. The Court also stated that it was going to permit the Government to withdraw the photostat Exhibit 123 (R. 616). The Court then instructed the jury that they were not to consider the evidence from the witness regarding the forgery of the witness' signature in considering the defendant's guilt or innocence (R. 616).

The witness then testified that her former husband's name and address appeared in Government's Exhibit 108, which had previously been identified as a file bearing the caption "Client List-1969" which had been seized in the search of the defendant's office (R. 617).

On cross-examination, the witness testified that she never received anything in the mail from the defendant (R. 618). She also testified that she had no personal knowledge concerning how the divorce decree was obtained (R. 618).

The defendant again renewed his objection and moved the Court to exclude from the jury's consideration all the evidence and all of the testimony from the witness (R. 618-619). The Court overruled the defendant's objection, denied his motion and admitted Exhibit 124 as evidence with respect to Count One only and indicated that it would give further instructions to the jury at the close of the case (R. 619).

The Government called Antoinette Calavas as its next witness. She testified that she came from Brooklyn, New York, to Birmingham, in August, 1969, after having received certain correspondence from the defendant in re-

sponse to a telephone call to his office. She testified that she gave the defendant $465.00 and received from him in person a divorce decree.

Additional arguments were also heard with respect to the testimony of Patricia Berger and the admission of Exhibit 123, testimony concerning same, its subsequent withdrawal and the substitution of Exhibit 124 in lieu thereof (R. 667-668). The Court took the matter under advisement at that time (R. 668).

The next morning, Antoinette Calavas, who had previously testified, was recalled for further cross-examination. She testified that the Birmingham Bar Association reimbursed the $465.00 which had been paid to the defendant for the divorce (R. 682).

The Government called as its next witness, Mrs. Mary Ann Neuhaus Graham, who testified that she came to Birmingham, Alabama in July, 1970, from her home in Point Pleasant, New Jersey (R. 684-686). She testified that she first contacted the defendant by phone on July 16, 1970, at which time she spoke to a woman who identified herself as the defendant's secretary (R. 687). She stated that a couple of days later she received through the mail some correspondence from the office of the defendant, which she identified (R. 689). She testified that after receipt of this correspondence she contacted the defendant's secretary by phone and made arrangements to come to Alabama to obtain a divorce (R. 691).

Defendant objected to these questions on the grounds that her testimony was inadmissible as regards Count One due to the variance in the allegation regarding the signing of a divorce decree by Judge French O. Whitten, Jr., it being known at the time the question was asked that she had received a divorce decree signed by Bob Moore, Jr., and on the further grounds that it was inadmissible with

respect to the offense charged in Count Six in that the question sought testimony regarding an occurrence on a date subsequent to the date of the offense charged in that Count of the indictment. The Court overruled defendant's objection on these grounds (R. 694).

The witness testified that she went to the defendant's office and had a conversation with his secretary, Mrs. Shirley Bowman, who elicited certain information from her relative to the divorce (R. 694).

She testified that she then met the defendant, who handed to her some papers regarding the validity of an Alabama divorce (R. 696). These papers had been underlined in red pen in certain places by the defendant (R. 697).

The witness testified that she gave Travelers Checks to Mr. Griffith in payment for the divorce (R. 697).

The witness testified that, in addition to Shirley Bowman, there was another woman, identified as Flo, in the defendant's office at the time that the witness visited that office (R. 699). The witness then was examined and testified at length regarding a conversation between the defendant and Shirley Bowman, his secretary, who was also named as a defendant in this indictment, concerning the discovery of a file which apparently could not be found at the Court House in Pell City (R. 700-707). She said that initially the conversation concerned the spelling of the name Neuhaus. She narrated a conversation by Shirley Bowman, the narration being interrupted and interspersed with the phrase "I believe". The defendant sent Mrs. Bowman to look at some files and she came back and gave a file to the defendant whereupon he told Mrs. Bowman to call Ann or Mary and tell them that they had found the records. (One of the named defendants in Count One of

the indictment was Ann Love, the Register of the Chancery Court in Pell City.)

The witness at this point was having some difficulty remembering precisely the substance of the conversation. The District Attorney, indicating that his purpose was to refresh the witness' recollection, began reading to the witness from a statement (R. 704). In response to the Court's inquiry as to the nature of the document used to refresh the witness' recollection, the U. S. Attorney replied "United States Attorney's Internal Work Papers" (R. 704).

The defendant at that time demanded to see the papers being used to refresh the witness' recollection. This demand was refused by the United States Attorney (R. 704).

The witness was asked several more questions regarding the conversation and it must here be noted that the majority of her responses were prefaced by the phrase "I believe" (R. 706). With respect to one particular question as to whether or not the defendant was asked whether to call Mary or Ann or someone else by either Flo or Mrs. Bowman, the witness stated that she believed that Mr. Griffith responded by saying "The Judge" (R. 706-707).

In response to a specific question as to whether the witness recalled whether or not the defendant specifically told Mrs. Bowman not to call one of them, the witness answered "I believe he told her not to call the Judge, not to call Mary" (R. 707).

The witness then testified that the defendant said to her that she was not supposed to be hearing that conversation (R. 708).

The witness also testified concerning conversations in which the defendant advised her that her divorce would be effective on the specific date that she was in his office,

to-wit: July 28, 1970. She also testified, in response to a question regarding a conversation with the defendant, "I believe he said I am divorcing you." (R. 717).

On cross-examination the witness testified that she had talked to Mr. Bill Hairston, who had previously been identified as an officer in the Birmingham Bar Association, while in Birmingham to obtain a divorce (R. 719).

At this point the defendant asked to be permitted to see the witness' statement. The United States Attorney replied "We don't have a statement." and "Not made to an agent of the Government, your Honor." The defendant's attorney asked "Where is the statement you were going to refresh her memory on?" United States Attorney responded "No Jencks material." (R. 719).

The defense indicated that it has no further questions on cross-examination (R. 179). The witness was then excused by the Court (R. 720).

The Court then took a short recess, at which time the United States Attorney made the following statement:

> "Your Honor, with respect to Mr. McCollough's statement, I would like to have in the record the Government's position (TH) at Jencks Act, Sec. 3500 by its specific definition defines a statement which is producible as a statement made to an agent of the United States and we have no such statement as that."

The Court responded:

> "Now, let me say this: Wherever such a statement is available, and where you do have such a statement, let Mr. McCollough have the benefit of it as quickly as you can; it will shorten the trial" (R. 721).

The following colloquy occurred out of the presence of the jury:

Mr. Alexander: "May it please the Court, at the recess I had stated something for the record with respect to production in response to Mr. McCullough's request for statement; I would add to the statement I had made that we are advised and have been advised that the previous witness had been interviewed by various members of the Bar Association; the results of those interviews had been made available to us; however, with respect to provisions of Title 18, Section 3500, known as the Jencks Act, we do not have any statement made to an officer or agent of the Government."

The Court: Mr.—

Mr. McCollough: Do you have in your possession a statement made to the Bar Association?

Mr. Alexander: You asking me or the Court?

Mr. McCollough: You.

Mr. Alexander: I will answer if the Court directs me to.

The Court: I didn't understand the question.

Mr. McCollough: I asked if he had a statement from the Bar Association in his file.

The Court: If he has a statement in his file by the Bar Association.

Mr. McCollough: Concerning the last witness?

The Court: You mean the statement this last witness gave the Bar Association?

Mr. McCollough: Yes sir.

The Court: He made the statement that the Bar Association made available to him those statements to the District Attorney's office.

Mr. McCollough: Would the Court require him to disclose that statement to us and make it available to us?

The Court: I don't think I have a right to make him disclose that particular file; I think—

Mr. McCollough: All right.

The Court: I think if there is anything in the material that would be favorable to the defendant, that he would have a duty to disclose that to you and I would so instruct him.

Mr. Alexander: Well, I do not know; of course, we have no way of knowing.

The Court: Well—

Mr. McCollough: And I move at this time under the Brady case—

The Court: And if you ask the Court to do so, I would read the statement.

Mr. McCollough: I would at this time so ask the Court to do so.

The Court: All right. Whatever you have, I will read it and make the determination.

Mr. Alexander: All right.

The Court: And if I find anything in my judgment that would be favorable to the defense, I would see that you see it.

There was additional testimony from witnesses the remainder of that day. The next morning the following occurred in the chambers of the Court: (R. 822).

Mr. Alexander: May the Government make a statement to get it moving, Judge?

The Court: Yes.

Mr. Alexander: We ask that the record show that with respect to the witness Neuhaus, I believe her name in the record is Graham, who was Neuhaus at the time she got a divorce, upon conclusion of her direct examination, defense asked for a copy of any statement which the Government resisted on the basis of the definition of a statement in Section 3500 which has heretofore been put in the record. A statement made by that witness to a representative of the Birmingham Bar Association and not made to an officer or agent of the Government, has been furnished to the Court for an in camera inspection by the Court. And no information was found therein favorable—

The Court: Let me state that.

Mr. Alexander: But it has been made available for the inspection of the Court.

The Court: Let the record show that I have read the statement in the presence of counsel for the defendant and for the Government; there was only one paragraph in the statement that I was uncertain about and I read that paragraph to counsel for the defendants. Apparently, and in my judgment, the statement does not contain any information that would be favorable to the defendant or would be of any additional assistance to counsel for the defendant in conducting cross-examination or that would call for further cross-examination. I found no conflict in the witness' testimony and between the testimony of the witness and the statement. Now, go on and get to your other evidence that showed up (R. 822-824).

In the interim, Mr. James A. Gehringer had testified for the Government to the effect that he had come from New Jersey to Alabama in January, 1970, after receiving certain papers in response to a letter he had sent to Mr. Griffith requesting information regarding an Alabama di-

vorce (R. 724-730). He testified that he later received in the mail an envelope bearing the return address of Grace Henderson, 2737 Cherokee Drive, Birmingham, Alabama, containing a divorce decree (R. 732-734). He also testified that while in Birmingham he gave Mr. Griffith's secretary $465.00 and she gave him a receipt for same (R. 737).

Mr. Christopher Stephen Kucharzak testified that he came to Birmingham, Alabama from New Jersey in January, 1970, after receiving certain correspondence in the mail pursuant to a telephone call to the defendant's office (R. 753-754). He gave the defendant $465.00 and after his return to New Jersey he received, in the mail, a divorce decree (R. 757).

Mrs. Patricia Kay Griffith and Mrs. M. Sonya Miller each testified that after receiving some correspondence from the defendant's office they came to Birmingham, gave the defendant a sum of money, returned to their homes and received, in the mail, a divorce decree.

Mr. Frank Mattea testified that he came to Birmingham from New Jersey in October, 1966, after calling the defendant's office and receiving certain correspondence from his office in the mail (R. 792-795). He testified that he gave the defendant $465.00 and later received, in the mail, a divorce decree.

Mr. Mattea was then questioned about a letter written by him and dated September 11, 1970. The defendant objected and asked to be heard outside the presence and hearing of the jury (R. 801). The Court indicated that it was going to let the letter in at that time but that it would not let the jury see it then and that it would give the defendant an opportunity to present his grounds of objections to the Court at a later time so as not to unduly delay the trial by causing the jury to leave the courtroom (R. 801). The witness testified that he had gone to the

Court House in Pell City in August of 1970, where he tried to find his divorce decree in the files of the Court (R. 803-810). He testified that he was unable to find his decree and that upon his return to New Jersey he wrote the letter to Mr. Griffith (R. 810).

At this point the District Attorney asked the witness to read the letter. The defendant's objection was overruled by the Court (R. 810). The Court indicated it would prefer that the jury read the letter for themselves (R. 811). This was notwithstanding the pendency of the defendant's request to make objections to the letter out of the presence of the jury (R. 810).

Miss Frances M. Connolly and Mrs. Linda Preston each testified that they came to Birmingham from New Jersey to get a divorce. Their testimony was substantially the same as the other witnesses who had testified.

The Government's next witness was Mr. Irving Reich who testified that his wife had come to Alabama from New Jersey to get a divorce after he had contacted the defendant by mail and received certain correspondence from the defendant in return (R. 874-882). He testified that he later contacted Mr. William Morrow of the State Bar Association by mail and that shortly thereafter he received a telephone call from the defendant (R. 884-889).

Mr. Reich was the last witness to testify for the Government during the first week of trial. At the conclusion of his testimony the Court recessed for the weekend.

On Monday morning, April 12, 1971, the Court was advised that Mr. Bill McCollough, Jr., Chief Counsel for the defense, had been hospitalized the previous day (R. 905). The defense moved for a continuance until Wednesday morning (R. 906).

The Court indicated that it would continue the case until Wednesday morning on the assumption that defendant's co-counsel and the U. S. Attorney would be able to agree to stipulation as to the testimony of the witness scheduled for the first two days of that week (R. 907-908).

The defendant himself objected to the Court's proposed plan of procedure and moved to the Court to grant a mistrial or a general continuance due to Mr. McCullough's inability to continue with the trial (R. 909-910).

The proceedings were then recessed until Wednesday April 14, 1971, at which time the defendant himself again renewed his motion for a mistrial on the ground that his attorney, Mr. Bill McCollough, Jr., was unable to continue to defend him due to his hospitalization (R. 915). The Court denied the defendant's motion and ordered the trial to continue in Mr. McCollough's absence (R. 916-917).

At this point certain stipulations of fact were made a part of the record in this case. With respect to one stipulation, that concerning the defendant's disbarment, the defendant objected very strongly (R. 919-924). The defendant's objection to evidence of the defendant's disbarment being presented to the jury in this trial was overruled (R. 924).

The stipulation regarding the defendant's disbarment (R. 45), together with stipulations concerning the testimony of Rosabell Moshier (R. 40-41), Grace Henderson (R. 42) and Mrs. Helen Bell (R. 42), were offered to the jury as evidence in this case (R. 937-944).

Miss Evelyn Turner, Deputy Clerk, Circuit Clerk's Office, St. Clair County, Alabama, then testified that she had been employed in the Clerk's office while French O. Whitten, Jr. was the Judge of that Court (R. 945-946). She testified as to the procedure followed in filing divorce

cases in Pell City, she identified the seal used by her as Deputy Register of the Court, and she testified regarding her failure to find certain divorce files in the record at the Pell City Court House (R. 947-981).

The next witness for the Government, Mrs. Barbara Warden, testified that prior to September, 1970, she was the secretary for Judge French O. Whitten, Jr. and that at the time she left his employment, the divorce files designated as Government's Exhibits 4-46 were not present in the anteroom to the Judge's chambers where Judge Waid testified that he had found them at some later date (R. 982-988).

The Government's next witness was Mrs. Shirley Bowman, who was a named defendant in the indictment in this case, and who testified that she worked for the defendant as his secretary from 1968 until 1970 (R. 990-991). She testified that the defendant handled approximately 50 divorce cases a month (R. 997). She testified regarding the procedure followed in the defendant's office with respect to the handling of the divorce cases during the period of the indictment (R. 998-1063).

With respect to the substantive offense charged in Count Three of the indictment the witness testified that she prepared the letter addressed to Mrs. Margaret E. Cramer (R. 1065-1066). The witness next identified many of the Government's exhibits as having been prepared by her in the defendant's office and at the defendant's direction (R. 1068-1080).

Mrs. Bowman was permitted to testify, over defendant's objection, that she had had a conversation with the defendant subsequent to the return of the indictment in this case wherein he advised her that if she testified she would not help herself or hurt herself but that she could hurt the defendant (R. 1081-1082).

The defendant's objections to this question and motion for mistrial based on its answer are found in the record at pages 1147 through 1151. These objections had previously been interposed before the Court in chambers when a Court Reporter was not present and the defense was given leave to insert these objections before the Court Reporter for the purpose of the record at a later time so as not to delay the trial.

The Government's next witness was Mrs. Freida Cook, who testified that she worked for the defendant as a secretary from 1963 until 1968 (R. 1111-1140).

Mr. W. A. Jenkins, Jr., a licensed attorney, was permitted to testify, over defendant's objections, concerning a conversation he had with Mrs. Ann Love on August 14, 1970, at Pell City, Alabama (R. 1177), and that he had examined the receipt books reflecting the payment of Court costs and found no receipt issued in the names contained on a list which was introduced as Government's Exhibit 160 (R. 1180). The District Attorney again indicated, when the defense requested the witness' statement, that only statements made to an officer of the United States were producible under the Jencks Act (R. 1182).

At this point the Government rested its case (R. 1189).

The defendant's motion for a mistrial based on the admission of testimony from Mr. Jenkins regarding a conversation between himself and Mrs. Ann Love was overruled by the Court (R. 1190-1191). The defense then moved the Court to strike the testimony of Miss Patricia Berger on the grounds of the prejudice resulting to the defendant from that testimony regarding her signature being forged to certain Government Exhibits (R. 1194-1198). The defendant's motion for judgment of acquittal (R. 1198-1205) was overruled by the Court (R. 1205).

The defense made an offer of proof of the Rules Governing the Conduct of Attorneys in Alabama (R. 1207), Alabama Statutes regarding the granting of divorces to non-residents (R. 1207), and several decisions of the Supreme Court of Alabama regarding the construction of these statutes and the validity of non-resident divorces in this State (R. 1208). Objections to this evidence were sustained by the Court, whereupon the defense rested (R. 1208-1209).

Final arguments to the jury were not transcribed by the Court Reporter and are not a part of this record (R. 1209).

The Court then gave its oral charge to the jury (R. 1213-1256). The defendant's objections to certain portions of the oral charge were overruled by the Court (R. 1257-1269).

The jury returned a verdict of guilty.

On appeal, the Fifth Circuit Court of Appeals dismissed all of petitioner's contentions as being without merit, except those dealing with noncompliance with the Jencks Act (18 U. S. C. 3500) which the Court held to be harmless error.

REASONS FOR GRANTING THE WRIT

I

Relying on *Helton* v. *United States,* 5th Cir. 1955, 221 F. 2d 338, petitioner sought reversal of his conviction on the grounds of prejudice arising from the improper admission of the testimony of Patricia Berger, that what purported to be her signatures on several Government Exhibits, including an answer and waiver which her husband used in securing an Alabama divorce, were forgeries.

The Court of Appeals disposed of this issue by finding that it was without merit.

Petitioner contends that the Court of Appeals has thereby sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The testimony of this witness was to the effect that several signatures on Government Exhibits previously admitted in evidence against the defendant were forgeries. No other testimony relevant to the issues before the Court was elicited from this witness.

The defense sought to forestall the admission of this prejudicial testimony by voir dire examination. Its efforts were fruitless as the Court overruled its motion to exclude the testimony and permitted the witness to testify regarding these forgeries.

At the time that the Court permitted this evidence to be admitted it gave the following instructions:

> THE COURT: "Now, ladies and gentlemen, I want to impress upon you that the defendant here, Mr. John Ike Griffith, is not charged with any offense other than that stated in the indictment, and there is nothing in the testimony here or in these documents that is intended to indicate to you, or that should indicate to you that Mr. Griffith had any part or knew anything about the forgery of this young lady's name; I will give you further instructions about this testimony later on. Mr. Griffith is not accused of forgery or anything of that type, and you should not consider the evidence from that viewpoint in considering his guilt or innocence.

I will further instruct you later on how you shall treat this evidence."

In the Court's oral charge to the jury at the conclusion of the trial, the Court gave the following instruction to the jury regarding the evidence complained of:

"At this time I also instruct you that the testimony of Mrs. Berger was allowed for whatever weight you might choose to give it in considering the conspiracy charge in Count One.

While she testified that she did not sign the answer and waiver, I instruct you that Mr. Griffith is not accused by the Government of having any knowledge whatsoever of that matter.

The usual procedure is for the complainant to bring the answer and waiver to Alabama with him after having had it signed by the respondent and witnessed in his home state. And no inference of any kind may be raised against the defendant because of Mrs. Berger's testimony to the effect that she did not sign the answer and waiver in connection with the divorce obtained by her husband."

While it is true that the Court specifically instructed the jury that they were not to infer that the defendant had anything to do with the forgery concerning which they heard testimony, the evidence of this offense was prejudicial and compels reversal. The jury could well have inferred, under the instructions given by the Court, that one of the co-conspirators did have something to do with this forgery. Under such circumstances, the prejudice arising from the erroneous admission of such prejudicial testimony requires that the petitioner's conviction be reversed and the cause remanded to the District Court for a new trial free of such error.

In disposing of this issue as being without merit, the Court of Appeals has ignored previous decisions of this Court to the effect that, absent a requirement of showing system or intent, evidence of offenses not charged in the indictment is not only inadmissible but prejudicial if admitted, *Boyd* v. *United States*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; and that where the improper evidence was calculated to make such an impression on the jury that no instruction from the Court could eliminate the prejudice thereby created, the defendant is entitled to a new trial. *Fiswick* v. *United States*, 329 U. S. 211, 218, 67 S. Ct. 224, 91 L. Ed. 196.

In *Boyd* v. *United States*, supra, this Court held that an accused is entitled to be tried upon competent evidence, and only for the offense charged. In charging the jury that Mrs. Berger's testimony was allowed for whatever weight the jury might choose to give it in considering the conspiracy charge, the District Court departed from the mandate in *Boyd*. This departure was sanctioned by the Court of Appeals when it found petitioner's contention of error to be without merit.

The genuineness vel non of the signatures on the Government's Exhibits was collateral to the issue being tried. The testimony that the signatures were forgeries afforded no legal presumption or inference as to the particular crime charged. Such proof tended only to prejudice the defendant with the jurors and to draw their minds away from the real issue.

Petitioner has been denied full benefit of the rules of evidence prescribed by law for the conduct of criminal trials. Petitioner's conviction is due to be reversed.

II

In *Rosenberg* v. *United States*, 360 U. S. 367, 76 S. Ct. 1231, 3 L. Ed. 2d 1304, this Court first considered the applicability of the harmless error rule to violations of 18 U. S. C. 3500 (hereinafter referred to as the Jencks Act). The Court was reviewing the propriety of a ruling of the Court of Appeals holding the trial judge's error in failing to deliver certain "statements" to be harmless. This Court affirmed on the basis that "the very same information was possessed by defendant's counsel as would have been available were error not committed." *Rosenberg* v. *United States*, supra. Factually, one of the documents was an original handwritten statement of which a typewritten copy had already been delivered to the petitioner's attorney at trial and the other was a letter addressed to the U. S. Attorney containing information already in the possession of the defense by way of the witness' admissions while testifying.

A harmless error situation involving the Jencks Act was next presented to this Court in *Clancy* v. *United States*, 365 U. S. 312, 81 S. Ct. 645, 5 L. Ed. 2d 574, in which the Court declined to follow its holding in Rosenberg in language which seemed to restrict that holding to "the particular circumstances of that case."

This same issue was again presented to this Court in *Killian* v. *United States*, 368 U. S. 231, 82 S. Ct. 302, 7 L. Ed. 2d 256. This Court reiterated its holding in Rosenberg but again expressly restricted application of the harmless error rule to a violation of the Jencks Act to a factual situation wherein the information withheld had previously been given to the defense in narrative statements covering the subjects dealt with in the statements which were not produced. As to Jencks Act material which was withheld, and not made available to the defense in some other

form, this Court did not even discuss the harmless error aspect but stated that if, on remand, the District Court should find that there did exist Jencks Act material which had not been made available to the defense, the petitioner was entitled to a new trial.

In a subsequent case, this Court concluded its opinion with the following footnote:

> "14. Understandably, no contention has been made that the refusal to produce the Interview Report can be deemed harmless error under the principles laid down in *Rosenberg* v. *United States*, 360 U. S. 367, 3 L. Ed. 2d 1304, 79 S. Ct. 1231. * * *"

thus apparently once again restricting the application of the harmless error rule to Jencks Act violations to factual situations such as were presented in *Rosenberg* v. *U. S.*, supra; *Clancy* v. *U. S.*, supra; and *Killian* v. *U. S.*, supra. *Campbell* v. *U. S.*, 373 U. S. 487, 83 S. Ct. 1356, 10 L. Ed. 2d 501.

Such is the extent of the application by this Court of the harmless error rule to violations of the Jencks Act. There is no authority contained in any decision of this Court which would warrant the extension of the application of the harmless error rule to the situation presented in this case or on the grounds that the witness' testimony was merely cumulative.

It would be an impossible task to collate all the decisions of the Courts of Appeals dealing with this issue and construing the decisions in the above cited cases. In order to demonstrate the confusion arising from conflicting constructions of this Court's decision on the subject, reference is made to those cases which seem to be most pertinent in light of the factual situation presented in this case and the questions presented in this petition. The

Second, Third, Sixth, Seventh, and District of Columbia Courts of Appeals have given a restrictive construction to the holdings in Rosenberg and Killian and have expressed reluctance to extend the application of the harmless error rule beyond the factual situation presented in those cases. *United States* v. *Ellenbogen*, 2nd Cir. 1965, 341 F. 2d 893; *United States* v. *Prince*, 3rd Cir. 1959, 264 F. 2d 850; *United States* v. *McCarthy*, 3rd Cir. 1962, 301 F. 2d 796; *Bergman* v. *United States*, 6th Cir. 1958, 253 F. 2d 933; *United States* v. *Lonardo*, 6th Cir. 1965, 350 F. 2d 523; *United States* v. *Sheer*, 7th Cir. 1960, 278 F. 2d 65; *Williams* v. *United States*, D. C. Cir. 1964, 338 F. 2d 286. These same circuits have also expressly held that it was not a proper function for the Court of Appeals, in the first instance, to determine whether or not a violation of the Jencks Act was prejudicial to the Appellant. *United States* v. *Ellenbogen*, supra; *United States* v. *Prince*, supra; *Bergman* v. *United States*, supra; *United States* v. *Sheer*, supra.

The Fifth and Eighth Circuit Courts of Appeals have, on the other hand, given an expansive construction to the cited cases of this court and determined, in the first instance, that the error was harmless; and in doing so, treated the violation of the Jencks Act as a technical rather than a substantive error.

In *Bergman* v. *United States*, supra, the Sixth Circuit Court of Appeals was presented a Jencks Act violation under factual circumstances somewhat similar to those in the instant case. Six witnesses testified for the Government. The Government had in its possession Jencks Act statements from five of those witnesses. The Court ordered four of the five statements given to the defendant, but withheld one such statement. The Court noted that the testimony of the witness whose statement was not delivered to the defense was cumulative. The Court nev-

ertheless reversed and held that it was not proper for the Court of Appeals to determine whether or not a defendant was prejudiced by a failure to make available Jencks Act statements and, in doing so, expressly recognized that the failure to make the statement available actually worked no prejudice to the defendants.

The Second Circuit Court of Appeals held in *United States* v. *Ellenbogen*, supra, that non-compliance with the Jencks Act was a violation of due process and stated that the statute left no room for the trial judge nor the appellate court to speculate as to how useful the statements withheld would have been for purposes of cross-examination or how important such cross-examination would have been to the defendant's case.

In *United States* v. *Borelli*, 2nd Cir. 1964, 336 F. 2d 376, 393, the Second Circuit expressed the view that the erroneous exclusion of a statement producible under the Jencks Act might lie beyond an appellate court's power of rescue under the harmless error rule.

The Seventh Circuit has held a violation of the Jencks Act to constitute substantial error and that it was not proper for the appellate court to determine whether or not the defendant was prejudiced by non-compliance. *United States* v. *Sheer*, supra.

The Third Circuit Court of Appeals in *United States* v. *Prince*, supra, stated: "In our view the mandate of the statute itself makes the omission substantial. It is not the function of the District Court or ourselves to determine whether the Appellant was prejudiced by (a violation of the act)."

In none of the above cited cases have the Circuit Courts of Appeals sought to extend this Court's decisions in Rosenberg, Clancy, and Killian beyond the facts therein

presented. Furthermore, the Third Circuit and the Sixth Circuit have expressed grave doubts that the harmless error holding in Rosenberg was applicable except in circumstances wherein the identical information withheld was otherwise available to the defendant. *United States* v. *McCarthy*, supra; *United States* v. *Lonardo*, supra.

The Fifth Circuit has, in this case, substantially departed from the holdings of this Court on the subject and has held a violation of the Jencks Act to be harmless error on the grounds that the witness' testimony was merely cumulative; that other evidence of the defendant's illegal conduct was overwhelming and that it believed that the error had no effect on petitioner's conviction. The Fifth Circuit cited Rosenberg as authority for this holding.

The Eighth Circuit Court of Appeals has likewise extended the holding of this Court in Rosenberg in applying the harmless error rule to cure non-compliance with the Jencks Act where the testimony of the witness was cumulative. *Lewis* v. *United States*, 8th Cir. 1965, 340 F. 2d 678; *Kane* v. *United States*, 8th Cir. 1970, 431 F. 2d 172.

Each of these Circuits has made the determination that the error was harmless in the first instance without support of any authority from this Court and contrary to the procedures followed by this Court in remanding cases to the trial court for resolution of that question. See, for example: *Killian* v. *United States*, supra.

The errors inherent in permitting the appellate court to make this determination in the first instance are apparent upon a close investigation of the Fifth Circuit's finding that the witness' testimony was cumulative in the instant case.

While certain areas of this witness' testimony were indeed cumulative, there was additional testimony from this witness regarding a conversation between the petitioner and Shirley Bowman, his secretary, who was named as a co-defendant in the indictment, concerning the discovery of a file which apparently could not be located at the Courthouse in Pell City, Alabama. The witness gave a lengthy narration of the conversation interspersed frequently with the phrase "I believe". Reference was also made by this witness to conversations between the petitioner and his secretary regarding the placing of a telephone call to someone named Ann or Mary for the purpose of advising such person that the records had been found. (One of the co-defendants named in Count One of the indictment was Ann Love, the Register of the Chancery Court in Pell City.)

The witness at this point was having some difficulty remembering precisely the substance of the conversation. The District Attorney, indicating that his purpose was to refresh the witness' recollection, began reading to the witness from a statement. In response to the Court's inquiry as to the nature of the document used to refresh the witness' recollection, the U. S. Attorney replied "United States Attorney's internal work papers".

The record clearly indicates that the majority of the responses of this witness to questions concerning the conversation were prefaced by the phrase "I believe". The witness also testified that the petitioner had made reference to "the Judge" in that conversation. (A Circuit Judge was also named as a co-defendant in the conspiracy charge.)

The witness testified that the defendant had told her that she was not supposed to be hearing the conversation.

No other witness testified concerning this or any similar conversation. This was, of course, the most important aspect of this witness' testimony. Her testimony regarding the mechanics of her Alabama divorce were certainly cumulative and not particularly damaging to the petitioner at that time. The same is not true of her testimony regarding this conversation. It was unique and its effect was devastating.

The District Attorney admitted possession of an affidavit given by this witness to an officer of the Birmingham Bar Association shortly after the conversation took place. The defense asked the Court to require the District Attorney to make the statement available to the defense. The District Attorney resisted on the grounds that the statement was not producible as not having been made to an agent of the Government. (This was subsequent to the 1970 amendment to the Jencks Act deleting the phrase "to an agent of the Government".)

The Court declined to order the Government to produce the statement. It did, however, conduct an in camera inspection of the statement and thereafter advised the defense that the Court found no conflict between the witness' testimony at trial and as contained in the statement.

The factual determination by the Court of Appeals in this case that the witness' testimony was "merely cumulative" is clearly erroneous.

This decision and the above cited decisions of the Eighth Circuit are bottomed on the proposition that if, after disregarding the testimony of the witness whose Jencks Act "statement" was not produced, there remains sufficient evidence to sustain the conviction, the error is harmless. There is nothing in the language in this Court's

decisions in Rosenberg, Clancy and Killian to sustain this proposition.

Rather than support the holding in this case, the following language used by this Court in Rosenberg would seem to preclude the application of the harmless error rule to this factual situation:

> "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled. However, when the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and a fair administration of justice to order a new trial." *Rosenberg* v. *United States*, supra.

This Court, in Killian and Clancy, has restricted the application of the harmless error rule in Rosenberg to the factual situations presented therein. The Second, Third, Sixth, Seventh, and District of Columbia Circuit Courts of Appeals have followed this construction.

The Fifth Circuit, in this case, and the Eighth Circuit in the cases hereinabove cited, have substantially departed from the holding of this Court in Rosenberg and have applied as a test of harmless error, whether there was enough evidence to support the conviction, apart from the phase affected by the error. The Fifth and Eighth Circuits have also, contrary to the holdings in other Circuits and the procedures previously followed by this Court, taken it upon themselves to make the determination rather than to remand the case to the District Court for determination.

The writ ought to be granted in this case in order to resolve the conflict regarding the construction to be given

to the decision of this Court in *Rosenberg* v. *United States*, supra; to establish guidelines for the application of the harmless error rule to violations of the Jencks Act; and to resolve the conflict among the Circuits regarding the appropriate forum for the determination of that issue in the first instance.

Inadvertent violations of the Jencks Act must, of necessity, be dealt with on a case by case basis. But where, as here, the error is clear and not inadvertent, it must be considered substantial in view of the mandate of the statute which was enacted to restrict the effect of a decision of this Court securing certain "rights" to an accused on trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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Of Counsel

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1911
SUMMARY CALENDAR*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
JOHN IKE GRIFFITH,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Alabama

(January 20, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: John Ike Griffith appeals from his conviction and sentence pursuant to an indictment charging him with conspiracy to use the United States mails to defraud, in violation of Title 18, U.S.C.A., Section 371, and five counts based on specific acts of mail fraud, in violation of Title 18, U.S.C.A., Section 1341. The convictions were based on substantial evidence that defendant, with others, fraudulently and through the use of the mails procured illegal divorces in Alabama for non-residents.

*Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

Defendant contends that his conviction should be reversed on numerous grounds:

1. The failure of the trial court to suppress evidence seized under an allegedly defective search warrant;

2. The admission of testimony which defendant contends was immaterial to his guilt and admitted solely for its prejudicial value;

3. The trial court's failure to grant his motion for a continuance or a mistrial after one of his attorneys became ill and was unable to continue at trial; and

4. Erroneous jury instructions on the applicable Alabama divorce laws.

5. The admission of a stipulation of both parties that defendant had previously been disbarred in Alabama.

We find it necessary only to state that these contentions have no merit whatsoever. *See* Local Rule 21.[1]

In addition, defendant complains of the admission of a certain witness' testimony without pre-cross examination disclosure under the Jencks Act, 18 U.S.C.A. § 3500 (1966).

Assuming that disclosure of the witness' previous statements made to the Birmingham Bar Association was required under the Jencks Act,[2] and assuming that a mo-

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1. *See NLRB v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F.2d 966.

2. The Jencks Act was amended in 1970 to delete the phrase "to an agent of the government." 18 U.S.C.A. § 3500 (Supp. 1970). It would thus appear that a statement to the Bar Association, if in the hands of the government, could be subject to disclosure. *See United States v. DeSimone*, 5th Cir. 1971, ____ F.2d ____ [No. 71-1859, December 16, 1971].

tion by defendant to strike the testimony was not necessary to preserve the error,[3] we would consider any such error by the trial court to be harmless. See Fed. R. Crim. P. 52 (a).

An examination of the witness' testimony in the instant case reveals that it was merely cumulative of the testimony of at least thirteen other witnesses concerning their correspondence with defendant, their visits to his office, and their subsequent receipt of a purported divorce decree. Such other evidence of defendant's illegal conduct is overwhelming. We therefore have no doubt that any such error had no effect on defendant's conviction. *See Rosenberg v. United States*, 360 U.S. 367, 79 S. Ct. 1231 (1959); *Kane v. United States*, 8th Cir. 1970, 431 F. 2d 172; *Lewis v. United States*, 8th Cir. 1965, 340 F.2d 678; *Harris v. United States*, 9th Cir. 1958, 261 F.2d 792, *cert. denied*, 360 U.S. 933, 79 S. Ct. 1446 (1959).

AFFIRMED.

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3. *Contra Lewis v. United States*, 8th Cir. 1965, 340 F.2d 678; *Rodgers v. United States*, 9th Cir. 1959, 267 F.2d 79; Fed. R. Crim. P. 51.